

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LAURIE M. LEWIS)	
Claimant)	
V.)	
)	
DOLLAR GENERAL #1457)	
Respondent)	Docket No. 1,075,925
AND)	
)	
DG RETAIL, LLC)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the April 28, 2016, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew M. Hogan of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 27, 2016, preliminary hearing and exhibits thereto; the transcript of the April 8, 2016, deposition of Christina Miller; the transcript of the April 8, 2016, deposition of Fawn Sackrider; and all pleadings contained in the administrative file.

ISSUE

The ALJ determined claimant failed to provide timely notice of her accident. The Preliminary Hearing Order states:

In this case, Claimant didn't give the employer proper notice. The only information the employer had was that Claimant's right knee hurt. The employer was not informed how, when and where the injury occurred and that it was work related. Claimant's testimony that she told the store manager everything and all

about it is not persuasive testimony that proper notice of her work accident was given.¹

Claimant asserts she suffered a right knee injury on Sunday, October 4, 2015,² when she stepped around a display box. She asserts she provided timely and appropriate notice to her manager on duty, Christina Miller, on the date of her accident. Claimant contends she again provided timely and appropriate notice on October 7 to respondent's store manager, Fawn Sackrider.

Respondent argues that prior to her alleged work accident, claimant had difficulty with her right lower extremity and limped. Respondent asserts that Ms. Miller and Ms. Sackrider were unaware claimant was reporting a specific injury and claimant failed to provide the time, date, place and particulars of her injury.

The sole issue is: did claimant provide timely notice of her injury by accident?

FINDINGS OF FACT

Claimant testified that prior to October 4, she had no right knee issues, but had back problems and an ingrown toenail on her right foot. She did not know if she was limping badly.

Claimant worked at respondent's store in Wamego. Between 11:30 a.m. and noon on October 4, claimant went down an aisle to put some items on a shelf. She attempted to dodge a display box in an aisle and her right knee twisted and popped. Claimant testified she hobbled to the front of the store and called Ms. Miller on the store's intercom.

At the time of her accident, claimant and Ms. Miller were the only employees working. Claimant informed Ms. Miller of injuring her knee, that it was painful, she could not continue stocking shelves and asked what she should do. According to claimant, Ms. Miller inquired if claimant needed to go home. Claimant replied that she could not put much weight on her right knee without it hurting. Ms. Miller stated that if she allowed claimant to go home, she (Ms. Miller) would not be able to get her work done and would be in trouble with Ms. Sackrider.

Claimant acknowledged she did not ask Ms. Miller about filing a workers compensation claim. She also confirmed that at her deposition, she said she could not remember if she told Ms. Miller how she injured her right knee.

¹ ALJ Order at 4.

² Unless otherwise noted, all dates are in 2015.

Claimant stayed at work until the end of her shift at 4 p.m. Her knee continued to be painful and swelled. Claimant was not allowed to sit during her shift, put a lot of her weight on her left leg and leaned against the register and counter. Claimant indicated that prior to her accident, she was able to put weight on her right leg and functioned normally. Claimant was off work the next two days.

On October 6 or 7, claimant went to the store and spoke to Ms. Sackrider. According to claimant, she was chastised by Ms. Sackrider for standing at the cash register all day and not getting her work done. Claimant explained that she had injured her right knee and she spoke to Ms. Miller, who told claimant to stay at the cash register because there was no one else to cover her shift. Claimant testified she asked Ms. Sackrider if she should contact someone and what to do. Ms. Sackrider told claimant she had 24 hours to contact ERC, corporate headquarters. Claimant indicated to Ms. Sackrider she was not aware she had to do that. Ms. Sackrider then replied it would not have done any good anyway. Claimant did not remember if she told Ms. Sackrider of twisting her knee. Claimant later testified she recalled telling Ms. Sackrider she twisted her knee going around a corner to avoid a box.

Claimant testified that within a week after the accident, she called the ERC nurse hotline three times and spoke to someone and told them what happened and that she needed to see a doctor. Claimant indicated she was told someone would get back to her, but no one ever did.

The Thursday after claimant's accident was truck day. On truck day, employees are timed on how fast they get items off their carts. Claimant worked that day, was in a lot of pain and told her co-workers about her pain. It took her ten minutes too long to get items off her cart. Claimant asked a co-worker to work one-half hour for her so she could see a doctor and the co-worker agreed. Claimant indicated she asked Ms. Sackrider if this was okay and she said it was up to the co-worker.

After going to see the doctor that day, claimant called Ms. Sackrider and was told to bring in the note. The note said claimant could return to work the next Monday. Claimant took the note to Ms. Sackrider, who indicated respondent does not accommodate anyone. When claimant returned to work on Tuesday, she received two write-ups, one for being slow in emptying her cart and another for being absent.

On November 3, claimant was ordered to pull items from sky cap shelves, which required her to stand on a ladder. According to claimant, she informed Ms. Sackrider she could not do that task safely and was not allowed on a ladder. Ms. Sackrider sent claimant home and told her she could not return until she was 100 percent. A couple of weeks later, claimant talked to Ms. Sackrider about coming back when her knee was better and she was told by Ms. Sackrider that she and the district manager had not decided if claimant could return to work. Claimant never returned to work. She stopped in the store several times to shop and let Ms. Sackrider know the status of her right knee. Claimant testified

she could not get treatment for her right knee because her health insurance would not cover the treatment since it was a work injury. Claimant later applied for unemployment benefits and learned respondent was alleging she quit.

Ms. Miller testified she is the assistant manager of the Wamego store, but on October 4, she was a key holder, who opened and closed the store. She testified, "Well, we spoke at work, we spoke that day. I was aware that she -- her knee was hurting, that was all I was aware of."³ Ms. Miller indicated the conversation took place in person, not over a phone. She testified, "She reported to me that her knee hurt when she had walked to the back and she did not -- I asked if she did anything and she said, 'Not that I know of. It just hurts and I can't walk.'"⁴ Ms. Miller testified she was not informed by claimant of going around a display. Later, Ms. Miller testified she was told by claimant, "I was walking back to put something away and I went around the corner and my knee started hurting."⁵ Ms. Miller also testified she asked claimant some basic questions such as whether she twisted her knee or fell, and claimant said no, it just started hurting.

Ms. Miller testified respondent's policy is that work injuries are reported to the nurse hotline and the phone number is posted in the office. Ms. Miller testified she would have called Ms. Sackrider if claimant had reported tripping or something similar.

After being told by claimant she was hurting, Ms. Miller observed claimant limping. Claimant said she could not climb the ladder and finish sky caps. Ms. Miller told claimant she could go home if need be. Claimant stayed at work, but remained at the cash register.

Ms. Sackrider testified that on October 5, she was informed by Ms. Miller claimant had to stay at the cash register because one of her knees was hurt and she could not perform all her tasks.

On the Wednesday following October 4, Ms. Sackrider worked with claimant. Ms. Sackrider asked claimant to do sky caps and was told by claimant that she could not climb ladders because her leg hurt. Ms. Sackrider testified, "She said that her leg started hurting the night before. That was about all she said really."⁶ Ms. Sackrider also testified, "She just said it started hurting at work. She didn't say she hurt herself at work."⁷ She

³ Miller Depo. at 10.

⁴ *Id.* at 14.

⁵ *Id.* at 24.

⁶ Sackrider Depo. at 23.

⁷ *Id.*

further testified, “She said she was walking to the back of the store and it started hurting. But this was not the first time that her leg had started hurting.”⁸

Ms. Sackrider testified that claimant previously came to work at least twice a week with an elastic bandage on her knee. When she arrived at claimant’s counsel’s office for her deposition, Ms. Sackrider saw claimant there and observed her wearing a brace on her right knee. Ms. Sackrider indicated claimant was wearing a knee brace on the same knee prior to October 4.

Ms. Sackrider acknowledged being given a note by claimant from her doctor dated October 8. The note said claimant could not work until the following Monday. Sometime after being given the note, Ms. Sackrider had conversations in the store with claimant about her knee. Claimant said she was waiting on the doctors to let her know when she was having knee surgery, she had a doctor and Medicaid was paying for her treatment.

According to Ms. Sackrider, a worker should first report a work injury to the manager on duty and then the manager would call the company nurse. The company nurse would then speak to the injured employee. The telephone number for the company nurse is posted in the store office. Ms. Sackrider indicated calling the company nurse is different from calling ERC. Claimant was told that if she could not complete 100 percent of her tasks, not to return to work. According to Ms. Sackrider, she and district manager Shawn McDonald eventually terminated claimant for failure to return to work.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹⁰

K.S.A. 2015 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

⁸ *Id.* at 24.

⁹ K.S.A. 2015 Supp. 44-501b(c).

¹⁰ K.S.A. 2015 Supp. 44-508(h).

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment and prepare a defense.¹¹ It is undisputed claimant reported her knee was hurting to Ms. Miller on October 4. Claimant did not recall if she told Ms. Miller how the injury occurred. However, Ms. Miller testified she was told by

¹¹ See *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

claimant that she was walking back to put something away and went around the corner and her knee started hurting. That is sufficient evidence of the time, date, place and particulars of claimant's injury by accident.

Claimant also provided timely notice to respondent when she spoke to Ms. Sackrider on October 6 or 7. Claimant testified that after being chastised for not completing her work on October 4, she told Ms. Sackrider she twisted her knee going around a corner to avoid a box. Ms. Sackrider testified that on October 7, she was told by claimant that her leg began hurting when she walked to the back of the store. Again, that is sufficient information concerning the time, date, place and particulars of claimant's injury by accident.

Finally, claimant testified that within a week after the accident, she attempted to call the ERC company nurse. When someone answered, she told them what happened and asked to see a doctor. That uncontroverted testimony is also sufficient evidence that claimant provided timely notice to respondent of the time, date, place, who was injured and the particulars of the injury by accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

WHEREFORE, the undersigned Board Member reverses the April 28, 2016, Preliminary Hearing Order entered by ALJ Sanders and remands the matter for further consideration of the remaining issues raised by claimant at the preliminary hearing.

IT IS SO ORDERED.

Dated this ____ day of June, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

¹² K.S.A. 2015 Supp. 44-534a.

¹³ K.S.A. 2015 Supp. 44-555c(j).

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Honorable Rebecca Sanders, Administrative Law Judge